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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LAUREL ROWE,
Plaintiff,
v.
MICHAELS STORES, INC.,
Defendant.

Case No. [5:15-cv-01592-EJD](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY
ADJUDICATION; DENYING MOTION
FOR CLASS CERTIFICATION
WITHOUT PREJUDICE; SETTING
TRIAL SETTING CONFERENCE**

Re: Dkt. Nos. 26, 44

I. INTRODUCTION

Plaintiff Laurel Rowe ("Rowe") initiated this putative class action against her former employer, Defendant Michaels Stores, Inc. ("Michaels"), for various California Labor Code violations including failure to pay minimum wages and overtime, failure to provide rest breaks and meal periods, failure to provide accurate wage statements, and failure to pay all wages owed upon termination. Rowe also asserts claims for penalties pursuant to Labor Code §558, remedies under California's Private Attorneys General Act of 2004, and for unlawful competition in violation of Business and Professions Code §§17200 *et seq.*

Michaels moves for summary adjudication as to all claims except claims 3 (relating to rest breaks) and 4 (relating to meal periods) to the extent those claims are based on unpaid wages.

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1 Michaels contends that Rowe has no concrete evidence that her time records were improperly
2 edited or that she was underpaid as a result. The Court finds it appropriate to take the motion
3 under submission for decision without oral argument pursuant to Civil Local Rule 7-1(b). For the
4 reasons set forth below, Michaels' motion is GRANTED in part and DENIED in part.

5 **II. BACKGROUND**

6 Michaels operates arts and crafts retail stores. Rowe worked at a Michaels store in Gilroy,
7 California from April 2013 through August 2014 as a Customer Experience Manager for Events
8 and was responsible for managing the store's cashiers, among other duties. Rowe was designated
9 as the store's Manager on Duty ("MOD") once or twice a week. As MOD, Rowe was responsible
10 for all of the store employees, including making sure that they were clocked in while working and
11 took proper meal breaks.

12 Michaels uses an electronic time keeping system called Workbrain. All work time must be
13 entered into Workbrain before payroll can be processed. Michaels requires the employees in the
14 Gilroy store to record their work time by punching in and out on a time clock. If, however, an
15 employee attempts to punch in before a scheduled start time, the time clock does not record the
16 time punch, and the employee needs to submit an edit sheet.

17 Michaels' store "Support Specialists" input the edit sheets into Workbrain. Employees
18 generally sign their initials next to proposed edits on an edit sheet. Sometimes the Support
19 Specialist would speak to an employee about a proposed edit instead. If an employee was not
20 available to review the proposed edit when payroll needed to be processed the Support Specialist
21 would input the edit based on the scheduled work time.

22 While employed by Michaels, Rowe worked 327 shifts. There are no edits for 188 of the
23 327 shifts, and Rowe acknowledges that Michaels paid her correctly for these shifts. For an
24 additional 80 shifts, Rowe initialed the edit on the edit sheet and Rowe acknowledges that
25 Michaels paid her properly for these shifts.

26 As for the remaining 59 shifts, there are edits to Rowe's time punch records that she did

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1 not initial. Rowe does not know if these un-initialed edits are accurate and “suppose[s]” that they
2 could be accurate. Rowe Dep. at 200:7-201:2. For 43 of the 59 shifts, the edits consist of adding
3 a time punch where no punch existed, either at the beginning or end of a shift, or at the beginning
4 or end of a meal break. For another 3 of the 59 shifts, Rowe did not enter any time punches at all,
5 so all her punches on these shifts were added by edit. For another 5 of the 59 shifts, the edits
6 consisted of changes to time punches made by Rowe: 4 of the 5 edits resulted in greater pay for
7 Rowe, and the other edit was made to conform to the time Rowe was scheduled to work that day.
8 The final eight of the 59 remaining shift edits involved the addition of an “in” and “out” punch for
9 a meal break.

10 Michaels moves for summary adjudication on several claims, asserting that Rowe has no
11 evidence that any of the edits to the 59 shifts were inaccurate or improper. In opposition, Rowe
12 contends that she was not paid for time she worked off the clock during meal breaks, was not paid
13 for time she worked outside of her scheduled work hours, and was not paid break premiums.

14 III. STANDARDS

15 A motion for summary judgment should be granted if “there is no genuine dispute as to any
16 material fact and the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(a);
17 Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). The moving party bears the
18 initial burden of informing the Court of the basis for the motion and identifying the portions of the
19 pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the
20 absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct.
21 2548, 91 L.Ed.2d 265 (1986).

22 If the moving party meets this initial burden, the burden shifts to the non-moving party to
23 go beyond the pleadings and designate “specific facts showing that there is a genuine issue for
24 trial.” Fed.R.Civ.P. 56(e); Celotex, 477 U.S. at 324. The court must regard as true the opposing
25 party’s evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324.
26 However, the mere suggestion that facts are in controversy, as well as conclusory or speculative

1 testimony in affidavits and moving papers, is not sufficient to defeat summary judgment. See
2 Thornhill Publishing Co. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979). The non-moving party
3 must come forward with admissible evidence. Fed. R. Civ. P. 56(c); see also, Hal Roach Studios,
4 Inc. v. Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990).

5 A genuine issue for trial exists if the non-moving party presents evidence from which a
6 reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the
7 material issue in his or her favor. Anderson, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91 L.Ed.2d
8 202; Barlow v. Ground, 943 F.2d 1132, 1134-36 (9th Cir. 1991). Conversely, summary judgment
9 must be granted where a party "fails to make a showing sufficient to establish the existence of an
10 element essential to that party's case, on which that party will bear the burden of proof at trial."
11 Celotex, 477 U.S. at 322.

IV. DISCUSSION

A. Alleged Spoliation of Evidence

14 Rowe requests that the Court draw an adverse inference against Michaels as a sanction for
15 alleged spoliation of evidence, specifically edit sheets. According to former Michaels employee
16 Vincent Ruvalcaba ("Ruvalcaba"), he was asked to send copies of time and edit sheets from the
17 Gilroy store to Michaels' corporate office. When he retrieved them from the store, he noticed that
18 many of the edit sheets were missing, and that others were noticeably altered. Ruvalcaba Decl.,
19 ¶10. "For instance, several of the time clock edit requests had been cut up, folded up and taped
20 together with other sheets." Id. Ruvalcaba thought another Michaels employee, Eden Portugal
21 ("Portugal"), had altered the edit sheets by cutting them into pieces and taping them back together.
22 Id. During deposition, however, Ruvalcaba could not recall how many edits sheets appeared to be
23 missing, the dates for which edits sheets appeared to be missing, when the edit sheets went
24 missing, or why they went missing. Ruvalcaba testified that three or four edit sheets had been cut
25 and taped to another time sheet, but did not know whether the cutting and taping covered any
26 information. Ruvalcaba also testified that he had no idea whether Portugal cut or taped the

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1 documents. This evidence is insufficient to justify any sanction for alleged spoliation as explained
2 below.

3 Spoliation “refers to the destruction or material alteration of evidence or to the failure to
4 preserve properly for another’s use evidence in pending or reasonably foreseeable litigation.”
5 Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) (citing West v. Goodyear Tire &
6 Rubber Co., 167 F.3d 776, 779 (2nd Cir. 1999)). In general, “[t]rial courts have widely adopted
7 the Second Circuit’s three-part test” to determine when the use of adverse inferences as sanctions
8 is appropriate. Apple, Inc. v. Samsung Elecs. Co., 888 F.Supp.2d 976, 997 (N.D. Cal. 2012).
9 The Second Circuit’s test provides that “a party seeking an adverse inference instruction based on
10 the destruction of evidence must establish[:] (1) that the party having control over the evidence
11 had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed
12 ‘with a culpable state of mind’; and (3) that the evidence was ‘relevant’ to the party’s claim or
13 defense such that a reasonable trier of fact could find that it would support that claim or defense.”
14 Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002) (quoting
15 Byrnies v. Town of Cromwell, 243 F.3d 93, 107-12 (2d Cir. 2001)).

16 Ruvalcaba’s declaration and testimony are too vague to establish destruction of evidence.
17 The three or four edit sheets that have been cut and taped, which were produced during discovery,
18 do not appear to have been materially altered because the data is unobscured. Further,
19 Ruvalcaba’s declaration and testimony are insufficient to satisfy the Second Circuit’s three-part
20 test: it is unclear when the edit sheets allegedly went missing or were altered; there is no evidence
21 from which to infer Michaels had a culpable state of mind; and Rowe has not demonstrated the
22 relevance of the allegedly missing or altered edit sheets. Accordingly, Rowe’s request for the
23 imposition of a sanction against Michaels for the alleged spoliation of evidence is denied.

24 B. Evidentiary Objections

25 Rowe’s evidentiary objections to the declaration of former Michaels employee Eden
26 Portugal (“Portugal”), ¶¶3-13 are overruled. Portugal is the store manager for the Michaels store
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1 in Gilroy. Her description of Michaels' time keeping policies is admissible pursuant to
2 Fed.R.Evid. 602.

3 Rowe's evidentiary objections to the declaration of Michaels' counsel, Jeremy Bollinger,
4 ¶¶2-13 summarizing the contents of edit sheets are overruled. The edit sheets, which were
5 submitted by Michaels' Vice President of Field Human Resources, Doug Marker, are admissible
6 business records pursuant to Fed.R.Evid. 803. Summary evidence prepared by counsel is
7 admissible pursuant to Fed.R.Civ.Evid. 1006. Moreover, Rowe's evidentiary objections are, in
8 part, inconsistent with Rowe's Separate Statement of Facts, in which Rowe designates as
9 undisputed facts set forth in Bollinger Declaration, ¶¶4-9. Rowe's evidentiary objection to
10 Bollinger Declaration ¶15, regarding Rowe's letter to the Labor and Workforce Development
11 Agency is also overruled; Rowe submitted the same letter for the court's consideration.

12 C. Rowe's First And Second Causes of Action for Unpaid Wages

13 The focus of Rowe's claims for unpaid minimum wages and unpaid overtime wages are
14 the shifts for April 9, 2014, May 1, 2014, July 19, 2014, and August 12, 2014, for which Rowe did
15 not clock out for a meal break, but her time was edited to show a break even though she did not
16 fill out an edit request. Plaintiff's Opposition, pp. 9-10. Rowe states in her declaration that there
17 were "many times when I would have to work through meal breaks." Decl. of Laurel Rowe, ¶7.
18 Rowe contends that the edits to the four shifts constitute "time shaving" that deprived her of 30
19 minutes of compensable working time each shift.

20 Rowe also points to the shifts she worked on April 25, 2014, May 22, 2014, July 12, 2014,
21 August 12, 2014, August 16, 2014, and August 19, 2014, for which she did not record a time
22 punch at the beginning of her shift, but her time was later edited to show that she clocked in at her
23 scheduled start time, even though she never filled out an edit request for these six shifts. Id. at
24 p.10. Rowe contends that oftentimes she was required to start working before her scheduled shift.
25 In a declaration, Rowe explains:

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1 6. As one example . . . I was oftentimes [sic] required to work at
2 Kids Club in the mornings. In order to begin my duties for Kids
3 Club, I was required to begin work at 9:30 a.m. My job duties in
4 this capacity would require me to get projects ready for the classes
5 in advance of the time which they were scheduled to begin.
6 Routinely, when I was supposed to work for Kids Club, I recall
7 being scheduled by my store manager for my normal shift with a
8 start time of either 10:00 a.m. or 10:30 a.m. When this happened, I
9 would not be able to clock in for my shift when I arrived at the store,
10 because I was not yet scheduled to start for the day and arrived
11 before my scheduled start time. I would, in those instances, begin
12 my job without being able to clock in, and therefore, work
13 significant amounts of time off the clock and outside of my
14 scheduled work hours. The time clock would not let me clock in
15 early, which was why this was a problem. Similarly, there were also
16 many instances where I was required to work later than the time for
17 which I was scheduled.
18

19 Decl. of Laurel Rowe, ¶6. In light of the limitation in Michaels' time record keeping system that
20 prevented employees from clocking in prior to their scheduled start time, Rowe contends that it is
21 reasonable to infer that she was underpaid for the days she needed to start preparing before her
22 scheduled shift, such as when she was assigned to work at Kids Club.

23 As an initial matter, Rowe's declaration contradicts her prior testimony regarding working
24 outside her scheduled hours. During deposition, Rowe confirmed that she was not claiming to
25 have performed work that was unrecorded. Rowe Depo. at 148:6-12, 150:4-7. A party cannot
26 create an issue of fact by an affidavit contradicting her prior deposition testimony. Kennedy v.
27 Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991). Moreover, the evidence relied upon by
28 Rowe is insufficient to raise a genuine issue of fact for trial. Rowe conceded during her deposition
 that she doesn't know exactly what the edits were for or why they happened. Rowe Depo. at
 187:20-21. Nor does Rowe have any reason to believe that store managers Ms. Portugal, Ms.
 Santos, or Mr. Osmus improperly edited her time records or instructed somebody else to do so. Id.
 at 187:10-13, 188:5-18. Rowe also testified that she has no "solid, concrete" evidence that
 someone added a meal break for shifts when she did not take a break. Rowe also testified that she
 did not think the district manager, to whom the store managers reported, had any involvement in
 editing her time records. Id. at 187:7-9. Further, Rowe acknowledged that the edits she did not

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1 authorize could have been accurate. Id. at 200:7-201:2. Rowe also testified that she has no
2 documents that reflect any discrepancies in her time records, and that she is unable to estimate the
3 amount by which Michaels allegedly underpaid her. Id. at
4 203:1-6, 204:8-11.

5 Rowe is able to recall only one shift, either on July 12 or August 12, during which she was
6 required to work through a meal break. Rowe Depo. at 182-183, 203-204. This single shift,
7 however, is insufficient to raise a triable issue as well. To prevail on a claim for “off-the-clock”
8 work, a plaintiff must demonstrate knowledge on the part of the employer of the “off-the-clock”
9 work. See [Morillion v. Royal Packing Co., 22 Cal.4th 575, 585, 94 Cal.Rptr.2d 3, 995 P.2d 139 \(2000\)](#); [White v. Starbucks Corp., 497 F.Supp.2d 1080, 1083 \(N.D. Cal.2007\)](#) (“[t]o prevail on his
10 off-the-clock claim, [plaintiff] must prove that Starbucks had actual or constructive knowledge of
11 his alleged off-the-clock work.”); [Brinker Rest. Corp. v. Superior Court, 53 Cal.4th 1004, 1051-52 \(2012\)](#) (liability contingent on proof that Brinker knew or should have known off-the-clock work
12 was occurring). Rowe has not presented evidence to show that Michaels knew or had reason to
13 know of Rowe’s alleged off-the-clock work. Instead, the evidence shows that Michaels maintains
14 a written policy expressly prohibiting “working off the clock,” and also requires that all time
15 worked “must be accounted for, even if it is outside your scheduled shift including overtime.” See
16 Michaels Associate Handbook attached as Exhibit A to Bollinger Decl.; see also Michaels
17 Standard Operating Procedure 109 Time Clock Procedures-Hourly attached as Exhibit 12 to Rowe
18 Deposition (“no associate is authorized to work ‘off the clock’ in the store or at home without
19 being paid”). Michaels’ written policy also explicitly instructed employees “to follow meal and
20 rest breaks per state law.” Id. Michaels’ written policy also explicitly warned that “[w]orking
21 unauthorized overtime is not permitted.” Id. Michaels also instructed employees to notify their
22 supervisor or Human Resources Representative if an employee suspected time clock/sheet fraud.
23 Id. Rowe understood these written policies, and indeed at times was responsible for making sure
24 other employees clocked in when they were working, and took proper meal and rest breaks
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1 consistent with Michaels' written policies. Id. at 61:162:2. Further, Rowe concedes that no
2 Michaels employee ever told her to miss her break. Id. at 119:22-24. Rowe also acknowledges
3 that no Michaels employee ever criticized or disciplined her, or any other employees, for working
4 overtime. Thus, there is no evidence to show that the Gilroy store adopted, encouraged, or
5 enforced any practice inconsistent with Michaels' written policy.

6 Instead, the evidence shows that certain managers filled in missing punches, based upon
7 either the employee's scheduled shift or the employee's verification of time worked, in order to
8 run payroll. See Decl. of Eden Portugal; Decl. of Lora McLellan. In the absence of any proof that
9 Michaels had actual or constructive knowledge of Rowe's off-the-clock work, Michaels is entitled
10 to summary adjudication as to Rowe's first and second causes of action.¹ See White, supra;
11 Brinker, supra; Porch v. Masterfoods, USA, Inc., 685 F.Supp.2d 1058 (C.D. Cal. 2008) (employer
12 entitled to summary judgment because employer did not have actual or constructive notice that
13 employee was working off-the-clock).

14 D. Rowe's Fifth, Sixth, Eighth and Ninth Causes of Action

15 Michaels seeks summary adjudication on Rowe's fifth, sixth, eighth and ninth causes of
16 action to the extent they are based on unpaid wages. Rowe does not dispute that the sixth, eighth
17 and ninth causes of action are derivative of her claims for unpaid wages. Accordingly, Michaels'
18 motion for summary adjudication on Rowe's sixth, eighth and ninth causes of action is granted to
19 the extent those claims are based on unpaid wages.

20 Rowe contends, however, that the fifth cause of action for failure to provide accurate wage
21 statements in violation of Labor Code §226 is not derivative of her underlying claim for unpaid
22 wages. Rowe reasons that under Pena v. Taylor Farms Pacific, Inc., 2014 WL 1665231 at *9
23

24 ¹ Because of the lack of proof showing Michaels' knowledge of Rowe's off-the-clock work, the
25 Court finds it unnecessary to consider Rowe's argument that Anderson v. Mt. Clemens Pottery
26 Co., 328 U.S. 680, 687-88 (1946) requires placing the burden of proof on Michaels to produce
evidence of the "precise amount of work performed" or otherwise negate a plaintiff's claim for
damages.

1 (E.D. Cal. 2014), accurate payment of inaccurately recorded hours violates Section 226, and
2 therefore her fifth cause of action remains viable even if she was not underpaid because her
3 statement of wages were based upon inaccurate time punches.

4 Section 226(a) requires employers to provide accurate itemized statements of wages to
5 their employees that contain certain statutorily mandated information. “An employer is only liable
6 for damages as a result of failing to furnish conforming wage statements, however, to employees
7 that ‘suffer[] injury as a result of a knowing and intentional failure by an employer to comply’
8 with Section 226. Cal. Labor Code §226(e). Therefore, a plaintiff seeking damages under Section
9 226 must establish (1) that a defendant’s wage statement violated one of the enumerated
10 requirements in section 226(a), (2) that the violation was knowing and intentional, and (3) a
11 resulting injury. Willner v. Manpower, Inc., 35 F.Supp.3d 1116 (N.D. Cal. 2014).

12 As previously discussed, Rowe has not presented evidence to show that any of her time
13 records were inaccurate, except for one time shift. Furthermore, there is insufficient evidence
14 upon which a reasonable jury could find that Michaels knowingly and intentionally violated
15 Section 226. Instead, the evidence shows that Michaels’ managers attempted to ensure the
16 accuracy of time punches. See Portugal Decl., ¶5; McLellan Decl., ¶¶10-12; Carbone Decl., ¶¶6-
17 8; Rael Tr., 16:4-17:4, 20:9-21:1. Accordingly, Michaels is entitled to summary adjudication on
18 the fifth cause of action to the extent it is based on unpaid wages.

19 E. Rowe’s Eighth Cause of Action for Remedies under Labor Code §2698 et seq.

20 Michaels also seeks dismissal of the eighth cause of action for failure to exhaust
21 administrative remedies as required by Labor Code §2699.3(a)(1). Michaels acknowledges that
22 Rowe sent written notice to the Labor and Workforce Development Agency (“LWDA”) regarding
23 the substance of her claims, but contends that the written notice did not provide sufficient
24 information to enable the LWDA to make an informed decision about whether to investigate
25 because the letter describes the group of affected employees as “Pest Control Technicians”
26 employed by Michaels.

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1 Put in context, it is plainly evident that the reference to “Pest Control Technicians” is a
2 typographical error, and that the substance of Rowe’s written notice to the LWDA otherwise
3 accurately identifies the parties and include the factual and legal bases for the claims in this
4 lawsuit. Moreover, Rowe submitted a draft of her state court complaint with her written notice,
5 which clearly identified the parties and the factual and legal bases of her claims. Accordingly, the
6 Court rejects Michaels’ assertion that Rowe failed to exhaust administrative remedies.

7 V. CONCLUSION

8 Defendant Michaels’ motion for summary adjudication on Rowe’s Eighth Cause of Action
9 for failure to exhaust administrative remedies is DENIED. Michaels’ motion for summary
10 adjudication is GRANTED as to the following claims: First Cause of Action for failure to pay
11 unpaid minimum wages; Second Cause of Action for unpaid overtime wages; Fifth Cause of
12 Action for inaccurate pay statements to the extent it is based on unpaid wages; Sixth Cause of
13 Action for Labor Code §203 penalties to the extent it is based on unpaid wages; Seventh Cause of
14 Action²; Eighth Cause of Action for remedies under the Private Attorneys General Act to the
15 extent it is based on unpaid wages; and Ninth Cause of Action for violation of California’s
16 Business and Professions Code §§17200 et seq. to the extent it is based on unpaid wages.

17 Because the Court’s rulings on Michaels’ motion for summary adjudication may have a
18 substantial impact on class certification issues, Rowe’s pending motion for class certification is
19 DENIED without prejudice. Rowe may, if appropriate, renew her motion for class certification if
20 there remains at least one claim for which she is able to satisfy the requirements of Rule 23,
21 Fed.R.Civ.P.

22 //
23 //
24 //

25 _____
26 ² Rowe does not dispute Michaels’ motion for summary adjudication on the Seventh Cause of
Action.

1 The Court will conduct a trial setting conference on November 2, 2017 at 11:00 a.m. The
2 parties shall file a joint trial setting conference statement no later than October 23, 2017.

3 **IT IS SO ORDERED.**

4 Dated: September 25, 2017



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6 EDWARD J. DAVILA
7 United States District Judge

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